



1 A. Standard of Review

2 A district court may entertain a petition for writ of habeas corpus “in behalf of a  
3 person in custody pursuant to the judgment of a State court only on the ground that he is  
4 in custody in violation of the Constitution or laws or treaties of the United States.” 28  
5 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975).

6 A district court shall “award the writ or issue an order directing the respondent to  
7 show cause why the writ should not be granted, unless it appears from the application that  
8 the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243. Summary  
9 dismissal is appropriate only where the allegations in the petition are vague or conclusory,  
10 palpably incredible, or patently frivolous or false. See Hendricks v. Vasquez, 908 F.2d  
11 490, 491 (9th Cir. 1990) (quoting Blackledge v. Allison, 431 U.S. 63, 75-76 (1977)).

12 B. Petitioner’s Claims

13 It appears from the petition that Petitioner challenges his 2002 assault with intent  
14 to commit rape conviction in Santa Clara Superior Court. In his grounds for relief,  
15 Petitioner makes several allegations that the D.A. and the Judge, with help from the  
16 Public Defenders office, “cooked” up an illegal charge against him and that he is  
17 innocent. See Petition at 3. Petitioner also maintains that he was mentally ill at the time  
18 of his arrest. Id. at 4. The petition states that the only issue raised on appeal was a  
19 double jeopardy claim. Id. at 5.

20 Based on the information in the instant petition, the Court cannot determine  
21 whether Petitioner has exhausted his claims in the California courts before filing this  
22 habeas action. Federal habeas petitioners are first required to exhaust state judicial  
23 remedies, either on direct appeal or through collateral proceedings, by presenting the  
24 highest state court available with a fair opportunity to rule on the merits of each and every  
25 claim they seek to raise in federal court. 28 U.S.C. § 2254(b),(c); Rose v. Lundy, 455  
26 U.S. 509, 515-16 (1982); Duckworth v. Serrano, 454 U.S. 1, 3 (1981); McNeeley v.  
27 Arave, 842 F.2d 230, 231 (9th Cir. 1988). The state’s highest court must be given an  
28 opportunity to rule on the claims even if review is discretionary. See O’Sullivan v.

1 Boerckel, 526 U.S. 838, 845 (1999) (petitioner must invoke “one complete round of the  
 2 State’s established appellate review process”). Therefore, Petitioner cannot present  
 3 claims to this Court which he has not first raised in the highest state court available, the  
 4 Supreme Court of California, usually by direct appeal or by way of a state habeas  
 5 petition.

6 The Court cannot fairly evaluate the petition in its present state. Accordingly, the  
 7 Court will allow Petitioner an opportunity to file an amended petition on the Court’s  
 8 habeas form to correct these deficiencies.

### 9 CONCLUSION

10 1. Petitioner’s motion to proceed in forma pauperis (docket no. 6) is  
 11 GRANTED.


12 2. The instant petition is DISMISSED with leave to amend within **thirty (30)**  
 13 **days** from the date of this order. The amended petition must include the caption and civil  
 14 case number used in this order (C 06-106 JF (PR)) and the words AMENDED PETITION  
 15 on the first page. The amended petition shall be on the Court’s form for habeas petitions,  
 16 **a copy of which is enclosed with Petitioner’s copy of this order.**

17 Petitioner shall take care to write clearly and legibly, so that the Court can read  
 18 what he writes. He must clearly state the grounds for relief challenging his 2002 Santa  
 19 Clara County conviction. He must set out how he has exhausted his claims, that is, what  
 20 he did to present them first to the highest state court available, which is the Supreme  
 21 Court of California.

22 3. It is Petitioner’s responsibility to prosecute this case. Petitioner must keep  
 23 the Court informed of any change of address and must comply with the Court’s orders in  
 24 a timely fashion. Failure to do so may result in the dismissal of this action for failure to  
 25 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

26 IT IS SO ORDERED.

27 DATED: 1/11/07

28   
 JEREMY FOGEL  
 United States District Judge

1 A copy of this ruling was mailed to the following:

2  
3 Herbert Russell, Jr.  
4 T-72288/ D-3 108 low  
5 Salinas Valley State Prison  
6 P.O. Box 1060  
7 Soledad, CA 93960-1060  
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